UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

ACE HEATING & AIR CONDITIONING CO., INC.		
and	**CASES**	**08-CA-133965**
		08-CA-133967
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33		**08-CA-133968**
- - - - - - - - - - - - - - - - - - - -		
ACE HEATING & AIR CONDITIONING CO., INC.		
Employer		
and	**CASE**	**08-RC-127213**
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33		
Petitioner		

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE (JD-03-15)

Rudra Choudhury
Counsel for the General Counsel
National Labor Relations Board
Region 8

(T) (216) 522-8182

(F) (216) 522-2418

rudra.choudhury@nlrb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Board Cases

Circuit Cases

Supreme Court Cases

I. INTRODUCTION & SUMMARY OF ARGUMENT

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel respectfully files this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge (ALJ) Arthur J. Amchan in JD-03-15.[1]

The ALJ committed reversible errors in his Decision dated January 15, 2015 in his failure to conclude that Respondent Ace Heating and Air Conditioning, Inc. (Respondent) engaged in objectionable conduct and violated Section 8(a)(1) of the Act by threatening employees with job loss and plant closure if they selected the Sheet Metal Workers International Association, Local 33 (Union), by offering bribes to employees for their votes, by interrogating an employee on election day about his union sympathies, by coercively telling employees that they would not receive pay raises because of the Union, and by issuing wage increases to employees while Union's post-election objections were pending in order to dissuade employees' union activities.

In summary, the ALJ failed to give sufficient weight to the substantial evidence of Respondent's misconduct, incorrectly applied Board precedent regarding whether the coercive acts of an admitted statutory supervisor are attributable to the Respondent, failed to analyze Respondent's post-election wage increases to employees under a Section 8(a)(1) framework as plead, and, throughout his Decision, made factual findings, credibility determinations and drew legal conclusions that are not supported by the record.

The ALJ found that during the critical period, Supervisor Ed Dudek threatened employees with job loss and plant closure if they voted in support of union representation. The ALJ credited testimony that Supervisor Dudek told employee James Mazzeo about Respondent's offer to pay employees for their vote. It is uncontroverted that Supervisor Dudek interrogated an

[1] References to the JD-03-15 will be referred to as ALJD, __ .

employee about his union vote. Despite these facts, the ALJ failed to apply established Board precedent imputing liability to an employer for the coercive remarks and conduct of a statutory supervisor.[2] Furthermore, the ALJ ignored record evidence that the Respondent told an employee immediately after the election that scheduled wage increases were on hold because the Union filed post-election objections. The ALJ found that Respondent gave post-election wage increases to two installers while the Union's objections were pending. The General Counsel filed a post-hearing Motion to Amend the Complaint alleging this uncontroverted evidence as a Section 8(a)(1) violation. Despite granting the General Counsel's Motion, the ALJ failed to consider these findings under an 8(a)(1) framework.

The ALJ's credibility resolutions concerning Supervisor Dudek and Respondent's owner Mitchell Stephen are ambiguous and unexplained, contrary to a preponderance of all of the record evidence. The ALJ's credibility findings were not primarily based on demeanor, and in some instances, not based on reasonable inferences drawn from the record.

Counsel for General Counsel respectfully requests the Board to conclude that based on its exceptions, the ALJ erred by failing to conclude that Respondent engaged in objectionable 8(a)(1) conduct during the critical period sufficient to warrant setting aside the May 21, 2014 election. Further, based on uncontroverted evidence that the Union obtained majority support in an appropriate bargaining unit, demanded recognition from the Respondent based on its majority support, and the Respondent's commission of hallmark violations during and after the critical period, Counsel for the General Counsel urges the Board to conclude that the ALJ erred by failing to find and conclude that the rights of Respondent's employees can most appropriately be protected by a remedial bargaining order.

---

[2]Notably, the ALJ acknowledges that agency "principles [concerning imputed liability] do not apply to an individual who is a statutory supervisor." (ALJD, p. 5, Line 26) Inexplicably, the ALJ misapplies this law to the record evidence.

II. QUESTIONS PRESENTED

1. Whether the ALJ erred by failing to apply well-established Board law that the coercive statements and conduct of a statutory supervisor are imputed to an employer without inquiry into the supervisor's agency status? (Exceptions 21, 22, 23, 24, 25, 26, 27, 28)
2. Whether the ALJ erred by making credibility resolutions that are not primarily based uon witness demeanor and are contrary to the preponderance of the relevant evidence? (Exceptions 6, 7, 8, 9)
3. Whether the ALJ erred by failing to conclude that Respondent violated Section 8(a)(1) by threatening employees with job loss and with plant closure, despite the ALJ's factual findings and substantial record evidence supporting this conclusion? (Exceptions 1, 2, 3, 4, 5, 8, 9, 14, 21, 22, 23, 25, 26, 28, 34, 35, 36)
4. Whether the ALJ erred by failing to conclude that Respondent violated Section 8(a)(1) by promising benefits to employees in the form or attempted bribes for voting against the Union, despite the ALJ's credited findings supporting this conclusion? (Exceptions 13, 16, 18, 21, 22, 23, 25, 28, 34, 35, 36)
5. Whether the ALJ erred by failing to find and conclude that Respondent violated Section 8(a)(1) by unlawfully interrogating an employee about his voting intentions, despite uncontroverted record evidence supporting this conclusion? (Exceptions 10, 11, 12, 21, 22, 23, 25, 26, 28, 34, 35, 36)
6. Whether the ALJ erred by failing to find and conclude that Respondent violated Section 8(a)(1) by coercively informing an employee that scheduled wage increases were withheld because the Union filed a challenge and objections to the election, despite

substantial uncontroverted record evidence supporting this conclusion? (Exceptions 20, 29, 30, 31, 32, 35, 36)

7. Whether the ALJ erred by failing to conclude that Respondent violated Section 8(a)(1) by granting wage increases to employees while the Union's objections to the election were pending, despite the ALJ's factual findings and substantial record evidence supporting this conclusion? (Exceptions 17, 33, 35, 36)
8. Whether the ALJ erred by failing to conclude that during the critical period, Respondent engaged in objectionable conduct which warrants the setting aside of the election in Case 08-RC-127213? (Exception 1-15, 21-28, 34, 36)
9. Whether the ALJ erred by failing to conclude that a *Gissel* bargaining order is warranted based on his findings that the Union obtained majority card support, that the Union made a demand for recognition and bargaining, and the substantial record evidence that the Respondent committed hallmark unfair labor practice violations? (Exceptions 1-36)

III. STATEMENT OF CASE

A. BACKGROUND, UNION'S MAJORITY STATUS AND DEMAND FOR RECOGNITION

The Respondent operates a heating and air conditioning business performing installation and service in Cleveland, Ohio. (Tr. 348-49) In April and May 2014,[3] Respondent employed eight employees. (Tr. 348) Seven employees worked in the installation division. (Tr. 349) Ed Dudek supervised all the installation employees, who reported daily to an assigned job site. (Tr. 349) In his capacity as a supervisor, Dudek had the authority to direct, assign, hire, layoff, discipline, discharge and reward employees, as well as the authority to grant employees time off. (G.C. Ex. 2(i), p. 2) In April and May, Dudek supervised the installers at the Shoreway Lofts job

[3] Unless otherwise noted, all dates are in 2014.

site, a commercial conversion of a warehouse to apartments. (Tr. 81-82) Vice President and owner of Respondent, Mitchell Stephen (Stephen) directly supervised Dudek. (Tr. 78) Stephen admits that he is a high ranking official for the Respondent and is viewed that way by his employees. (Tr. 82, 155, 167, 235, 267, 296, 353) In April and May, Stephen visited the Shoreway Lofts jobsite on limited occasions, generally communicating his instructions to employees through Dudek. (Tr. 269, 298) Dudek was considered by the installation employees to be their immediate supervisor. (Tr. 150, 165-166, 235, 267, 296, 436) The ALJ properly found that, "[w]hen [Dudek] told employees to do work on the jobsite, they would responsibly believe that he was speaking for management." (ALJD, p. 5, Lines 18-20)

On April 21, union organizer David Coleman solicited and obtained seven authorization cards from Respondent's eight bargaining unit employees. (Tr. 24-37, G.C. Ex. 3(A)-3(H)) While Dudek also signed an authorization card, he neither directed nor solicited employees to sign authorization cards, nor is there any credible evidence that Dudek coerced any employees to sign an authorization card. (Tr. 86)

On April 21, based upon the Union's majority card support, Coleman demanded recognition from Stephen. (Tr. 38-40, G.C. Ex. 4) Stephen did not respond to the Union's demand for recognition. (Tr. 42)

On April 24, the Union filed a petition for an election in Case 08-RC-127213 to represent Respondent's full-time installers and service technicians. (Tr. 42; GC Ex. 2(a)) A Board conducted election took place on May 21. The tally of ballots showed that four employees cast ballots for and four cast ballots against the Union. Ed Dudek's ballot was challenged. (GC Ex. 2(i)) On May 27, the Union filed a challenge and objections to the conduct affecting the results of the election. (GC Ex. 2(f)) On May 29, the Regional Director of Region 8 directed a hearing on the challenged ballot of Dudek to determine his eligibility to vote. (Ex. 2(g)). Pursuant to a Hearing Officer's Report and Recommendation, Dudek was found to be a statutory supervisor, the challenge to his ballot was sustained, and Dudek's ballot was unopened. (Ex. 2(i)) On August 14, the Board adopted the Hearing Officer's finding and recommendation that Dudek is a statutory supervisor, and remanded the petition to the Region for determination on the pending objections. (G.C. Ex. 2(k))

In its Answer to the Complaint, Respondent admits that Ed Dudek is a statutory supervisor and the ALJ properly concluded that Dudek is a supervisor within the meaning of Section 2(11) of the Act. (GC Ex. 1(p); ALJD, page 5, Line 13)

B. THREATS OF PLANT CLOSURE AND JOB LOSS

On April 23, after the Union demanded recognition from Stephen, Dudek and Stephen had a telephone conversation. (Tr. 87, 324-325) Stephen took Dudek's call at home within the hearing of his wife, Respondent's President Laura Stephen. (Tr. 419) During this conversation, Stephen asked Dudek which employees signed authorization cards. (Tr. 87) Dudek responded that everyone signed cards. (Tr. 88) Stephen instructed Dudek to "tell the guys if they wanted to take union jobs, take union jobs and leave him out of it." (Tr. 88) Laura Stephen testified that her husband told Dudek that if all the employees signed authorization cards, "why don't they go and get union jobs." (Tr. 422, 429-30) In the morning of April 24, Dudek met with employees at the job box at the Shoreway Lofts project. (Tr. 89) Dudek told the employees, "Mitch told me to tell you if you wanted union jobs, take union jobs. Leave him out of it." (Tr. 90) Installers Noble Hall, Chris Sikora, Steve Sarosy, Brian Orosz, Henry Huckoby and James Mazzeo were present at the job box and heard Dudek repeat Stephen's threat that employees should quit their employment if they wanted to join the Union. (Tr. 89-90) The ALJ failed to credit Dudek's testimony that he relayed Stephen's threat to employees to quit their jobs despite the fact that there is substantial record evidence which demonstrates that Stephen's instructions to Dudek were corroborated by President Laura Stephen. (ALJD, p. 4, fn. 6)

Dudek had at least five conversations about the Union with Stephen during the critical period preceding the election. (Tr. 91) These conversations, both in person and by phone, took place in the shop and on jobsites. (Tr. 91) Stephen repeatedly told Dudek that, "he would shut the doors if they (the employees) voted in the Union." (Tr. 91) Stephen directed Dudek to tell employees about his threat to close the business. (Tr. 92) On multiple occasions during the critical period, Dudek complied with Stephen's directive and told employees that if they voted for the Union, "Mitch" would shut the place down." (Tr. 92) Prefacing his comments to employees with "Mitch told me to tell you," Dudek repeatedly threatened employees that the Respondent's operations would close if they selected the Union and that employees would be out of a job. (Tr. 92-93) Dudek made these threats at the beginning of the workday, and when he distributed employees' paychecks. (Tr. 92) Dudek testified that more than five of the employees that he worked with knew that Stephen asked him to relay these threats of closure. (Tr. 93)

At the hearing, four employees credibly corroborated Respondent's threats of closure and job loss. Employees Joe Huckoby, Chris Sikora, Brian Orosz and Nobil Hall testified that about a week before the union election, on a Wednesday while Dudek passed out paychecks, Dudek told the employees that Mitch told him to tell the employees that if they voted in the Union, Stephen would close the business and that they would lose their jobs.[4] (Tr. 154, 241-242, 276,

[4] The record shows that when Dudek informed employees about the Respondent's threats of plant closure and job loss, Dudek ensured that employees were aware that these threats came from Respondent's high ranking official, Stephen and did not originate from Dudek. Each of the employees recalled that when Dudek relayed to them the threats of plant closure and job loss, Dudek prefaced the coercive remark, "Mitch told me to tell you" (Tr. 154, Joe Huckoby); "it was per Mitch" (Tr. 241, Brian Orosz); "it comes from Mitch" (Tr. 276, Chris Sikora); " that *he* [Mitch Stephen] would close the doors and they'd be out of a job. (Tr. 304 (Noble Hall)

304). Sikora testified that Dudek told employees on a payroll Wednesday about one or two weeks before the union election, that Dudek, "didn't want to tell us, but it was coming from Mitch, that if I voted for the Union, I would lose my job." (Tr. 276)

With regard to the above threats, the ALJ made the following factual findings:

> The election was scheduled on May 21. One week prior, on Wednesday, May 14, Dudek, at the Shoreway Lofts project, was handing out paychecks to installers Joe Huckoby, Noble Hall, Brian Orosz and Chris Sikora at the end of their workday. While doing so, Dudek said that at the direction of Mitch Stephen, he was informing these employees that Respondent would close its doors if they voted for union representation. (ALJD, p. 3, Lines 19-23)

Contrary to the ALJ's finding that, "[t]here was no discussion about this alleged threat amongst employees", the record establishes that after learning about the threat of closure and before the election, installer Joe Huckoby spoke to Brian Orosz and Noble Hall and all of the employees were in fear for their jobs and the ramifications of the threats. (Tr. 156)

Despite making the factual findings that Supervisor Dudek made threats of plant closure and job loss to multiple employees if they voted in support of union representation and that these threats originated from Stephen, the ALJ erroneously failed to conclude that Respondent was liable for Supervisor Dudek's coercive threats.

C. PROMISE OF BENEFITS TO EMPLOYEES IN THE FORM OF ATTEMPTED BRIBES FOR VOTES

The record establishes that between April 22 and April 24, installer James Mazzeo worked with Dudek on a job site. (Tr. 171). Dudek recounted to Mazzeo that Stephen told him the prior evening that there was no way Stephen was going to go union and that Stephen, "said he would pay the employees for their vote." (Tr. 172-174). Mazzeo testified that Dudek relayed that Stephen would give employees $1,000 to $10,000 in exchange for their vote. (Tr. 174). Consistent with the record, the ALJ found, "Dudek told installer Jimmy Mazzeo that Stephen would pay employees to vote against union representation." (ALJD, p. 4, Line 14-15) In his Decision, the ALJ stated, "I credit Mazzeo, a witness unsympathetic to the Union and the General Counsel, that Dudek told him this." (ALJD, p. 4, fn 7) Inexplicably, despite making the factual finding that the Respondent promised benefits in the form of attempted bribes to vote against the Union and crediting Mazzeo's testimony, the ALJ failed to conclude that this conduct violates Section 8(a)(1).

Further, despite the ALJ's finding that "Dudek did not talk to any employees about Stephen's statement about bribing employees," the record demonstrates evidence to the contrary. (ALJD, p. 4, Line 15, fn. 7) About a week before the union election, Stephen repeated to Dudek that he would buy employee votes. (Tr. 94-96) Specifically, Stephen directed Dudek again to tell employees that he would pay employees $1,000 to $10,000 for a no vote. (Tr. 96) Dudek told Stephen that he would not repeat the bribe to employees other than his conversation with Mazzeo. Dudek did not convey Stephen's monetary offer to employees during the critical period. (Tr. 96) However, the day after the May 21 election, Dudek told employees Henry Huckoby, Chris Sikora, Nobil Hall and Brian Orosz about Stephen's offer to buy votes. (Tr. 96-97)

D. UNLAWFUL INTERROGATION OF AN EMPLOYEE REGARDING HIS VOTING INTENTIONS

On May 21, the day of the election, Supervisor Dudek admitted that he asked installer Fred Corbin how he was going to vote. (Tr. 98) Corbin told Dudek how he would vote. (Tr. 99) Corbin was not an open union supporter. (Tr. 99) Dudek's questioning of Corbin's union sympathies followed Respondent's threats of closure and job loss and attempted bribery for employee votes. In failing to conclude that this conduct constituted an unlawful interrogation, the ALJ failed to credit Dudek's unrefuted testimony.

E. UNLAWFULLY INFORMING EMPLOYEES THAT SCHEDULED WAGE INCREASES WERE DENIED TO DISCOURAGE EMPLOYEES' UNION ACTIVITIES

Contrary to the ALJ's finding that, "the Respondent gave out wage increases in a 'haphazard manner'", the record shows that that prior to the filing of the Union's petition, Respondent had a plan to give employees wage increases. Two weeks before the filing of the petition, Stephen, Dudek and office employee Laurie Stephen had a conversation about the plan to give the raises. (Tr. 335-336, 396) Stephen admitted that as of that time, he formulated in his mind what increases would be given to employees. (Tr. 337-338).

Prior to the election, Stephen neither issued the pay increases, nor did he inform employees that wage increases were contemplated. (Tr. 178)

The record shows that about a week after the election, Stephen spoke with installer James Mazzeo about a subpoena served by the Union relating to a post-election hearing on the Union's objections and challenge. (Tr. 175-176). Mazzeo testified that Stephen told him that he withheld the scheduled raises because the Union contested the election results. Mazzeo's testimony reflects the following:

> Q. During the course of that conversation, did you and -- did Mitch talk to you about scheduled pay raises?
> A. Yes.
>
> Q. What did Mitch tell you about scheduled pay raises during that conversation?
> A. He said it was -- he had it – it was scheduled, or it was in the works that guys were going to get paid raises, but now everything was put on hold until this whole situation got rectified.
>
> Q. What situation was that?
> A. The whole Union, going Union or going non-Union, the voting process, going back to court.
>
> Q. Since that conversation with Mitch, were you -- and you've worked there - you're still a current employee there?

A. Yes.

Q. Have you received any pay raises from Mitch?
A. No. (Tr. 177-178)

The ALJ erred by failing to properly consider this record evidence. Clearly, Respondent unlawfully informed an employee that the scheduled wage increases were withheld to discourage employees' union activities.

F. UNLAWFULLY GRANTING POST-ELECTION WAGE INCREASES TO EMPLOYEES WHILE OBJECTIONS WERE PENDING IN ORDER TO DISCOURAGE EMPLOYEES' UNION SUPPORT

The uncontroverted record evidence demonstrates that despite making statements that scheduled wage increases were withheld, Stephen granted pay increases to two employees while the Union's post-election challenge and objections were pending. It is undisputed that Respondent gave wage increases to two installers, Fred Corbin and Steve Sarosy, after the election. (Tr. 402-405; ALJD, .page 4, Lines 15-16). The ALJ erred by failing to find that these wage increases violated Section 8(a)(1). It is reversible error that the ALJ analyzed the wage increase as an 8(a)(5) violation pursuant to Mike O'Connor Chevrolet, 209 NLRB 701 (1974) where there is no 8(a)(5) allegation plead to be a violation.

Counsel for the General submits that the ALJ erred by failing to find, consider and conclude, Respondent's post-election wage increases violated Section 8(a)(1). The wage increases to employees while the Union's post-election objections were pending was calculated to discourage employees from continuing their union and/or protected concerted activities.

IV. ARGUMENT

A. THE ALJ ERRED BY RELYING ON AN AGENCY ANALYSIS RATHER THAN DUDEK'S SUPERVISORY STATUS TO SUPPORT HIS ERRONEOUS CONCLUSIONS THAT DUDEK'S COERCIVE STATEMENTS AND REMARKS ARE NOT ATTRIBUTABLE TO THE RESPONDENT.

The ALJ failed to impute liability to Respondent for Dudek's threats of plant closure and job loss, the unlawful offers to bribe employees for their votes and the unlawful interrogation. In making this determination, the ALJ erroneously relied on common law agency principles finding that Supervisor Dudek lacked apparent authority when he made these threats and statements on Stephen's behest.

Notwithstanding the ALJ's apparent authority analysis, it is reversible error that the ALJ failed to consider that Dudek is an admitted statutory supervisor with broad authority to hire, fire, discipline and layoff Respondent's unit employees. Furthermore, the ALJ ignored record evidence from Joe Huckoby, Chris Sikora, Brian Orosz, Nobil Hall, James Mazzeo and Steve Sarosy that Dudek is their supervisor.

It is well-established that, "the Board has always imputed to their employers coercive remarks by statutory supervisors, without further inquiry into their agency status." Storer Communication, 294 NLRB 1056, 1077 (1989); *see, e.g.,* Arlington Electric, 332 NLRB 845, 851 (2000); Trader Horn of New Jersey, Inc., 316 NLRB 194, 195 (1995); Drennan Food Products, 122 NLRB 1353, 1353 (1959); J.T. Slocumb Co, 314 NLRB 231 (1994); Greenwich Air Services, 323 NLRB 1162, 1163 (1977); Jay Foods, Inc., 223 NLRB 423, *enf'd. on this point*, 573 F. 2d 438, 445 (7^{th} Cir. 1978); Glenroy Construction Co., Inc., 215 NLRB 866, 867 (1974). *See also*, NLRB v. Solo Cup Company, 237 F. 2d 521 (8^{th} Cir. 1956); NLRB v. Ace Comb Co., 342 F. 2d 841, 844 (7^{th} Cir. 1965). The Board has stated that, "Section 2(13) of the Act makes it clear that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not." Dorothy Shamrock Coal Co., 279 NLRB 1298, 1299 (1986).

Disregarding this established precedent, the ALJ confuses the analysis by suggesting that because Dudek had some involvement with the Union which was known to employees, that somehow he lacked the authority to speak on behalf of Respondent when making the threats, interrogation and other coercive statements. Other than signing a union card, which was not considered as part of the Union's majority, and limited communications that Dudek had with organizer Coleman at the beginning of the Union's organizing campaign, there is no record evidence to show that Dudek was an agent of the Union. Notably, the record fails to show any communications between Dudek and the Union after Stephen directed Dudek to threaten employees with plant closure and job loss.

In the absence of any evidence to show that Dudek was a union agent, it is reversible error to find that Dudek, a statutory supervisor, lacked apparent authority when he threatened, interrogated and coerced employees. Maidville Coal Co., 257 NLRB 1106, 1122-1123 (1981); Daniels Construction Co., 241 NLRB 336, 340 (1979). Respondent, having clothed Dudek with its authority, is responsible for the supervisor's misconduct.

The only remaining question, as raised by the ALJ, is whether Dudek's unlawful conduct cannot be imputed to Respondent because he was acting out of his own personal pro-union sympathies and employees had just cause to believe that he was not acting on behalf of the Respondent. *See*, Paintsville Hospital Co., 278 NLRB 724, 725 (1986); Montgomery Ward & Co, 115 NLRB 645 (1956). First, there is no evidence to demonstrate that Dudek threatened, interrogated and coerced employees because of Dudek's personal pro-union sympathies. The contention is illogical.[5] The ALJ found, employees "reasonably believed that [Dudek] was speaking for management." (ALJD, p. 5, Lines 20-21). Dudek was the only supervisor on the

[5] Even the ALJ expressed doubt with his own finding stating, "it is difficult to understand why [Dudek] would pass such a statement along, even if Stephen did tell him to threaten employees." (ALJD, p. 3, fn. 4)

Shoreway Lofts jobsite and it is undisputed that he exercised broad daily supervisory authority. Supervisor Dudek testified that he explicitly told employees that the Respondent's threats of plant closure and job loss and offers to bribe employees came directly from Stephen and not from him. At the hearing, Respondent produced no evidence to establish that despite Dudek's supervisory status, his statements could not be relied on by employees, that employees had any notice that Dudek was not authorized to speak on behalf of the Respondent, or that employees reasonably should have known that Dudek did not possess such authority.

In finding that Respondent is not liable for Dudek's statements, the ALJ incorrectly relied on National Apartment Leasing, 272 NLRB 197 (1984). In that case, the Board applied the Third Circuit's holding in NLRB v. Schroeder, 276 F. 2d 967, 972 (3rd Cir. 1984), finding that a supervisor's actions on behalf of management is a rebuttable presumption. (ALJD, p. 5, fn. 9). Again, the ALJ erred by applying this rebuttable presumption analysis. As noted in Storer Communication, *supra.* at fn 44, while the Board accepted this "rebuttable presumption" as the law of the case in National Apartment Leasing, the Board explicitly stated that it does, "not otherwise adopt the change in approach suggested by the Third Circuit." Notwithstanding the law of the National Apartment Leasing case, the ALJ has a duty to apply Board precedent and not the contrary views of a circuit court of appeals. Hillhaven Rehabilitation Center, 325 NLRB 202, fn. 3 (1997)

Based on the substantial record evidence, Dudek's coercive remarks and conduct were made to employees as Respondent's statutory supervisor and unit employees reasonably believed that Dudek was speaking on behalf of management. Counsel for the General Counsel urges the Board to conclude that Supervisor Dudek's coercive remarks and conduct are attributable to the Respondent.

B. THE ALJ ERRED BY MAKING CREDIBILITY RESOLUTIONS THAT ARE NOT BASED ON WITNESS DEMEANOR AND ARE CONTRARY TO THE CLEAR PREPONDERANCE OF ALL RELEVANT EVIDENCE.

While the Board is reluctant to overturn the credibility findings of an Administrative Law Judge, it is reversible error when an ALJ does not support his findings based on the record or witness demeanor. Bralco Metals, Inc., 227 NLRB 973, 973 (1977)

The Board has consistently held that where credibility resolutions are not based primarily on demeanor, the Board itself may proceed to an independent evaluation of credibility. Stevens Creek Chrysler Dodge, 357 NLRB No. 57, *slip. op.* at 5 (Aug. 25, 2011) (*citing* J.N. Ceazan Co., 246 NLRB 637, 638, fn. 6 (1979); Electrical Workers Local 38, 221 NLRB 1073, 1074 (1975). Further, even demeanor-based credibility findings are not dispositive when testimony is inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole. Stevens Creek Chrysler Dodge, *supra.* at 5.

Where an ALJ provides no more than generalized, conclusory statements regarding credibility determinations, such findings are not entitled to ordinary deference. Be-Lo Stores v. NLRB, 126 F. 3d 268, 278 (4^{th} Cir. 1997). The ALJ's credibility findings concerning the testimony of Dudek and Stephen must be reversed. The ALJ's Decision does not state that he relied upon demeanor in reaching his ambiguous credibility findings that he does "not find Dudek any more credible than Stephen" or that he does "not find Dudek sufficiently more credible that Stephen to credit his testimony". (ALJD, p. 3, Lines 27-28; p. 4, Lines 11-12) Although, the ALJ generally alludes to demeanor, he does not specifically refer to Dudek's or Stephen's demeanor in making his less than clear credibility determinations.

The ALJ credibility findings with respect to Dudek, are not consistent with the weight of the evidence nor are they based uon reasonable inferences that can be drawn from the record.

Credited testimony was offered by five employees that they were either threatened by Dudek with job loss or plant closure or informed by Dudek about Stephen's bribe to vote against the Union. (ALJD, p. 3, Lines 19-23; p. 4, Lines 14-15) The ALJ, however, does not make any specific credibility findings regarding Dudek's testimony on these threats or offers to bribe employees despite Dudek's admissions.

The ALJ failed to credit Dudek's testimony that on May 21, he was directed by Stephen to relay his threat to employees to quit their job if they joined the Union. (ALJD, p. 4, fn. 6). However, the record evidence demonstrates that Stephen instructed Dudek to "tell the guys if they wanted to take union jobs, take union jobs and leave him out of it." (Tr. 88) Further, Laura Stephen corroborated that her husband told Dudek that if all the employees signed authorization cards, "why don't they go and get union jobs." (Tr. 422, 429-30)

The last instance where the ALJ discredits Dudek's testimony concerns his interrogation of employee Fred Corbin. Dudek offered unrefuted testimony that he interrogated Corbin about his voting intentions. No evidence was presented to rebut Dudek's admission. Counsel for the General Counsel submits that the ALJ erred in this credibility resolution as it is contrary to the unrefuted testimony. The ultimate choice in making findings of fact based on credibility is based upon witness demeanor, unrefuted testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. <u>Northridge Knitting Mills</u>, 223 NLRB 230 (1976); <u>V & W Castings</u>, 231 NLRB 912, 913 (1977); <u>Gold Standard Enterprises,</u> 234 NLRB 618 (1978). The ALJ fails to make any reference to Dudek's demeanor and thus what remains is Dudek's uncontraverted testimony regarding this interrogation.

Counsel for the General Counsel submits that the Board must proceed with a de novo review of the record and reverse ALJ's credibility findings concerning Dudek and Stephen.

C. ALJ ERRED BY FAILING TO CONCLUDE THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING EMPLOYEES WITH JOB LOSS AND WITH PLANT CLOSURE.

The ALJ found that one week prior to the election, Supervisor Dudek, while handing out employees' paychecks, told installers Joe Huckoby, Noble Hall, Brian Orosz and Chris Sikora that, at the direction of owner Stephen, he was informing these employees that Respondent would close its doors if they voted for union representation. Despite making such factual findings and relying on the uncontroverted evidence, the ALJ failed to conclude that these threats of plant closure and job loss violated Section 8(a)(1).

While the Respondent claims, and the ALJ erroneously found that Dudek's threats and coercive conduct, should not be imputed to Respondent, established Board law instructs that threats from statutory supervisors where a company official's name is invoked is just as coercive as when it is made by a company official. In C&T Manufacturing, 233 NLRB 1430, 1430 (1977), the Board noted,

> Threats from a so-called first line supervisor, accompanied by the use of names of the company officials…are as coercive upon the employees as if made by the company officials themselves, since they are perforce considered to be authoritative by the employees and taken to be spoken directly for higher management.

It is well-established that predictions of plant closure and loss due to unionization must be based on objective facts, otherwise such statements violate Section 8(a)(1). NLRB v. Gissel Packing Co., 395 US 575, 618 (1969). In each instance that Dudek unlawfully threatened employees with job loss and closure, he told employees that the threats came directly from Stephen, and not from him. There is no record evidence that the threats of plant closure and job loss were based on any objective facts.

In Dlbak Corp. 307 NLRB 1138 (1992), the Board held that statements about plant closure and loss of jobs made without any rational basis are unlawful. Unsubstantiated predictions that a plant shutdown will result from a union victory are unlawfully coercive and violate Section 8(a)(1). Federated Logistics & Operations, 340 NLRB 255, 256 (2003). Further, telling employees that they should quit violates Section 8(a)(1) as it is an implicit threat that unionization is incompatible with continued employment, and that union supporters will be discharged. Oxburn-Hessy Logisitics, 359 NLRB No. 109, *slip. op.* at 2 (May 2, 2013).

Respondent's threats of plant closure and job loss are also objectionable conduct. A violation of Section 8(a)(1) occurring during the critical period interferes with the results of the election unless it is so de minimis that it is "virtually impossible" to conclude that the violation could have affected the results of the election. Midsouth Drywall Co. Inc., 339 NLRB 480, 481 (2003).

The Board has repeatedly held that threats of plant closure and job loss are "among the most flagrant" violations of the Act and "have lingering effects" that cannot "be readily dispelled." NLRB v. Gissel Packing Co., 395 US 575, 618 (1969); *see, e.g.,* Evergreen America Corp., 348 NLRB 178, 180 (2006); El Rancho Market, 235 NLRB 468, 478 (1978); Broyhill Co., 260 NLRB 1366 (1982). Such threats have an irreparable and coercive effect on employees' freedom of choice in the election of a collective bargaining representative. Hedstrom Co., 235 NLRB 1193, 1195 (1978) Here, the record shows that Respondent's employees were exposed to the threats throughout the critical period, including instances shortly after the Union filed the election petition, and notably while Dudek passed out paychecks to employees one week prior to the election.

Substantial record evidence supports a finding that Dudek was expressly authorized by Stephen to make threats of job loss and closure to employees. The record is clear that Stephen explicitly directed Dudek to communicate these threats. The record is also clear and uncontroverted that Dudek followed Stephen's directives and made these threats and coercive statements to employees. (Tr. 88, 91-92) The ALJ ignored the evidence that Laura Stephen corroborated that Stephen told Dudek that if all the employees signed authorization cards, "why don't they go and get union jobs." (Tr. 422, 429-430) The ALJ's reliance on the absence of evidence to show that employees did not address the threats of closure and job loss with either Dudek or Stephen after they were threatened is misplaced. (ALJD, p. 5, Lines 34-35) It does not reasonably follow that employees could not reasonably believe that Dudek was speaking on behalf of management because employees did not talk to Dudek or Stephen about the threats. There is no Board precedent that suggests that employees must follow up on threats and coercive statements to ascertain whether the speaker had the authority to speak. Again, Dudek was a statutory supervisor. In making the threats and other coercive statements, Dudek invoked owner Stephen's name. To require evidence that employees revisit the threats with Stephen or Dudek in order to find a violation is reversible error. The record is clear that employees discussed Respondent's threats among themselves. Joe Huckoby testified that he, Brian Orosz and Noble Hall feared for their jobs. (Tr. 156).

Counsel for the General Counsel urges the Board to reverse the ALJ's conclusions and find Respondent committed objectionable conduct and violated Section 8(a)(1) by threatening employees with job loss and with plant closure during the critical period.

D. THE ALJ ERRED BY FAILING TO CONCLUDE THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY PROMISING BRIBES FOR VOTES AGAINST THE UNION.

Despite crediting Mazzeo's testimony that shortly after the Union obtained majority card support, Mazzeo was told by Supervisor Dudek that Stephen would pay employees between $1,000 and $10,000 for their vote in the union election, the ALJ failed to conclude that this monetary promise violated Section 8(a)(1). (ALJD, p. 4, Line 13-14, fn. 7; Tr. 172-174).

It is well-settled that an employer's promises of benefits violate Section 8(a)(1) when they are timed to affect the election. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). In Roth IGA Foodliner, 259 NLRB 132 (1980), the Board found that the employer's bribes of promissory notes for no votes violated Section 8(a)(1). Here, during the critical period, Dudek told Mazzeo that Stephen would pay employees between $1,000 and $10,000 for their vote. Again, as with the threats of plant closure and job loss, Dudek invoked Stephen's name. The ALJ credited Mazzeo's testimony yet failed to find a Section 8(a)(1) violation.

Consistent with Mazzeo's credited testimony, the record is replete with evidence that immediately after the May 21 election, Dudek repeated Stephen's offer to buy votes. Such statements dissuade employees from continued support for the Union, particularly when election objections are pending. Furthermore, such monetary promises make a fair re-run election impossible. In Dlbak Corp., 307 NLRB 1138, 1160 (1992), the Board found that the granting of bonuses after a union election was unlawful where it had reasonable tendency to interfere with employees' Section 7 rights.

Based upon the ALJ's credited testimony, as well as the substantial record evidence, Counsel for the General Counsel urges the Board to reverse the ALJ's conclusion and find that the Respondent committed objectionable conduct and violated Section 8(a)(1) by bribing employees for no votes.

E. THE ALJ ERRED BY FAILING TO CONCLUDE THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY UNLAWFULLY INTERROGATING AN EMPLOYEE ABOUT HIS VOTING INTENTIONS.

There is uncontroverted evidence that on the day of the election, Supervisor Dudek interrogated installer Fred Corbin about how he was going to vote. No evidence was presented to rebut Dudek's admission that he interrogated Corbin. Furthermore, there is no question that Dudek's questioning is an interrogation that violates Section 8(a)(1).

The test for determining whether an interrogation violates the Act is not a *per se* one, but whether under the totality of the circumstances, the interrogation restrains or interferes with rights under the Act. Rossmore House, 269 NLRB 1176 (1984) The Board looks to such factors as the background, the nature of the information sought, the identity of the questioner and the place and method of the interrogation. *See, e.g.,* Sunnyvale Medical Center, 277 NLRB 1217 (1985).

Dudek's questioning of an employee about how he would vote comes in an atmosphere where Respondent had clear union animus as evidenced by the Section 8(a)(1) misconduct described above, as well as the ALJ's findings that shortly after Coleman demanded recognition, Stephen told Coleman that Ace Heating was not going to be a union company. (ALJD, p. 3, Lines- 13-14)

The Board has found that questioning by a lower level supervisor violates Section 8(a)(1), where it is accompanied by threats of plant closure, job loss and other coercive conduct. *See e.g.*, Elm Hills Meats, 205 NLRB 285, 295 (1973); Bon Appetit Management Co., 334 NLRB 1042, 1044 (2001). Further, a statutory supervisor's questioning about how individual employees intend to vote in a secret ballot election serves no legitimate purpose where employees are given no assurances against reprisal. Jefferson Smurfit Corp., 325 NLRB 280, 285 (1998). Dudek is an admitted statutory supervisor with the effective authority to discipline and discharge employees. Dudek gave Corbin no assurances against reprisal. Dudek questioned Corbin on the day of the election. Based upon the totality of the circumstances, Dudek's questioning about how Corbin would cast his vote in an atmosphere mired by other unlawful conduct, reasonably has a coercive and deleterious effect on employees' Section 7 rights.

Dudek's testimony about the interrogation is unrefuted. Respondent did not call Corbin to testify. Counsel for the General Counsel urges the Board to find that based on the substantial and unrefuted evidence, the Respondent committed objectionable conduct and violated Section 8(a)(1) by unlawfully interrogating Corbin about his voting intentions.

F. THE ALJ ERRED BY FAILING TO FIND AND CONCLUDE THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY COERCIVELY INFORMING AN EMPLOYEE THAT SCHEDULED WAGE INCREASES WERE WITHHELD BECAUSE THE UNION FILED A CHALLENGE AND OBJECTIONS TO THE ELECTION.

The substantial record evidence shows that a week after the election, while the Union's objections and challenge were pending, Stephen told Mazzeo he was withholding pay raises because the Union filed post election objections and a challenge.

Stephen's statement blames the Union for the delay in employee pay increases, thus discouraging employees from engaging in continued Section 7 activities. Statements regarding the status of wage increases after an election, and while objections are pending, can violate the Act, if it is an attempt to influence results if a second election is ordered. Electric Hose Co., 262 NLRB 186, 205 (1982). The test for determining whether such statements violate the Act is whether the statements reasonably tend to impinge upon employees' freedom of choice in an upcoming scheduled election or an election which might be directed in the future. LRM Packaging, Inc., 308 NLRB 829, 834 (1992); Marine World USA, 236 NLRB 89, 90 (1978). By attributing the delay in granting wage increases to the Union because it filed a post election challenge and objections, Respondent sends a clear message to employees that the Union stands in the way of raises that they were scheduled to receive. In the eyes of employees, such statements discourage employees from further union support if, in fact, a re-run election was ordered.

Based upon the substantial record evidence, Counsel for the General Counsel urges the Board to reverse the ALJ's conclusion and find that the Respondent violated Section 8(a)(1) by coercively informing employees that they were denied scheduled pay increases because of the Union.

G. THE ALJ ERRED BY FAILING TO CONCLUDE THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY GRANTING WAGE INCREASES TO EMPLOYEES WHILE THE UNION'S OBJECTIONS TO THE ELECTION WERE PENDING.

It is uncontroverted that the Respondent granted pay increases to two installers while post-election objections were pending. The ALJ concluded that the wage increases do not violate Section 8(a)(5) which is neither plead in the Complaint, nor the subject of the General Counsel's Motion to Amend the Complaint. The General Counsel moved to amend the Complaint to allege that the post election wage increases violate Section 8(a)(1). The ALJ properly granted the General Counsel's Motion to Amend the Complaint, yet erroneously failed to find the wage increases violated Section 8(a)(1). The ALJ did not even analyze the evidence as Section 8(a)(1) conduct, rather erroneously found that it does not violate Section 8(a)(5).

The General Counsel fully briefed the wage increases as a Section 8(a)(1) violation in its Motion to Amend Complaint, as well as its post-hearing brief. Accordingly, Counsel for the

General Counsel urges the Board, to reverse the ALJ's legal conclusion and find that the Respondent violated Section 8(a)(1) by granting the post-election wage increases.

Post-election benefits conferred to employees to erode union support in the event of a second election constitutes an unfair labor practice. Superior Emerald Landpark Landfill, 340 NLRB 449, 462 (2003) (*citing*, Wis-Pak Foods, Inc., 319 NLRB 933, 939 (1995), *enf'd.* 125 F.3d 518, 525 (7th Cir. 1997) (holding that an employer violates Section 8(a)(1) where an employer grants pay increases to employees at a time when the union objections to a representation election)). Here, Respondent's issuance of wage increases to employees while objections to the election are pending effectively diminishes the Union's ability to serve as their collective-bargaining representative. Respondent claims that it granted Corbin and Sarosy the wage increases due to its fear that these employees would leave for higher paying jobs. (Tr. 404) However, given Respondent's unlawful threats of plant closure and job loss and attempted bribery of employees to discourage their support for the Union, its issuance of pay increases to two employees was designed to dissuade all of its employees from continuing to support the Union, further bolstering the argument that if ordered, a fair re-run election cannot be held.

H. THE ALJ ERRED BY FAILING TO CONCLUDE THAT DURING THE CRITICAL PERIOD, RESPONDENT ENGAGED IN OBJECTIONABLE CONDUCT WHICH WARRANTS THE SETTING ASIDE OF THE ELECTION.

It is well settled that the Board, in conducting elections, must maintain and protect the integrity of the process. Section 7 assures employees that they may freely and fairly express their views regarding representation, without an employer engaging in conduct that interferes with employees' freedom of choice or engages in conduct that that could well have affected the outcome of the election. Fessler & Bowman, Inc., 341 NLRB 932, 934 (2004). The Respondent engaged in threats of plant closure, threats of job loss, unlawful offers for votes and unlawful interrogation all during the critical period of the election. This unlawful conduct is supported by the record and the ALJ's failure to find such conduct objectionable sufficient to warrant setting aside the May 21 election, is reversible error. *See*, *e.g.*, Smithfield Foods, Inc., 347 NLRB 1225 (2006) (threats of plant closure, threat of job loss and interrogation); Dlbak Corp., 307 NLRB 1138 (1992) (threats of plant closure, granting of bonuses to interfere with employees Section 7 rights); Blue Grass Industries, 287 NLRB 274 (1987) (threats of plant closure, interrogation, promising benefits to discourage employees' union activity).

Counsel for the General Counsel urges the Board to reverse the ALJ's conclusion Respondent's conduct is not objectionable thus warranting that the election results be set aside.

I. THE ALJ ERRED BY FAILING TO FIND AND CONCLUDE THAT A *GISSEL* BARGAINING ORDER IS WARRANTED.

The General Counsel further submits that the ALJ erred by failing to find that a *Gissel* bargaining order is an appropriate remedy.

Relief in the form of a bargaining order is appropriate when an employer commits unfair labor practices so serious that it is all but impossible to hold a fair election even with traditional Board remedies. In NLRB v. Gissel Packing Co., 395 U.S. 575, 611 (1969), the United States Supreme Court stated, "[i]f an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election…the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign."

In *Gissel*, the U.S. Supreme Court identified two categories of cases in which employer misconduct warrants the imposition of a card-based bargaining order remedy. *Id.* at 610. Category I cases involve outrageous and pervasive unfair labor practices that make a fair election impossible, and Category II cases involve less extraordinary and less pervasive unfair labor practices, but which nonetheless have a tendency to undermine majority union support, once expressed through authorization cards, and render the possibility of a fair election slight. *Id*. at 614; Stevens Creek Chrysler Dodge, 357 NLRB No. 57 *slip. op.* at 8 (Aug. 25, 2011); California Gas Transport, 347 NLRB 1314, 1323 (2006). The instant case falls into a Category II type *Gissel* case.

The Union must demonstrate that it obtained authorization cards from a majority of employees in an appropriate bargaining unit without misrepresentation, and that it requested recognition and bargaining from the Employer. Phillips Industries, Inc., 295 NLRB 717, fn 10 (1989). The ALJ properly found that at the time the Union requested recognition on April 21, it had seven signed authorization cards from the eight employees in the bargaining unit. (ALJD, p. 2, Lines 30-34) Further, the substantial record evidence demonstrates that none these cards are tainted or were obtained through misrepresentation and the ALJ made no factual findings to the contrary.

Additionally, to secure a bargaining order, an employer's misconduct must be sufficiently serious that it will have a tendency to undermine the union's majority strength and make a fair election unlikely. In such cases, the Board considers the following factors in determining whether to impose a *Gissel* bargaining order remedy: (1) the presence of hallmark violations, (2) the extent of the dissemination among employees, (2) the number of employees affected by the violations, (3) the size of the unit, (4) direct evidence of impact of the violations on the union's majority, (6) the identity of the perpetrator of the unfair labor practice, and, (7) the likelihood the violations will recur. *See, e.g.*, Stevens Creek, 357 NLRB No. 57 *slip. op.* at 8; Abramson, LLC, 345 NLRB 171, 176 (2005); Garvey Marine, Inc., 328 NLRB 991, 993 (1999).

Contrary to the ALJ's erroneous legal conclusions, the substantial record evidence shows that the Respondent committed highly coercive unfair labor practices during and after the critical period. These "hallmark" violations support the issuance of a *Gissel* bargaining order in the absence of some significant mitigating circumstance. Garvey Marine, Inc., 328 NLRB 991 (1999). Hallmark violations include threats of plant closure, threats of jobs loss and the granting of significant benefits to employees.

During the critical period, the Respondent committed multiple threats of plant closure and job loss to discourage employees' union support and activities. In *Gissel*, the Supreme Court noted that threats of plant closure are demonstrably "more effective to destroy election conditions for a longer period of time than others." Gissel, *supra.* at 611, n. 31. Repeated plant closure threats and threats of discharge alone have been found to warrant a remedial bargaining order. NLRB v. The Sinclair Glass Co., 397 F.2d 157 (1st Cir. 1968), *affd.* in Gissel, *supra.* at 615; Bi Lo, 303 NLRB 749 (1991).

The Respondent also promised employees money for votes both before and after the election, and granted post-election wage increases to employees in an effort to discourage employees' continued union activities. The Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees." America's Best Quality Coatings Corp., 313 NLRB 470, 472 (1993), *enf'd.* 44 F.3d 516 (7th Cir.), *cert. denied* 515 U.S. 1158 (1995). Not only did Respondent's unfair labor practices during the critical period dissipate employees' majority support for the Union, but its misconduct after the election continues to dampen employees' enthusiasm for union activity.

Respondent's threats of plant closure and job loss were disseminated to seven of the eight unit employees. This widespread dissemination of the threats further supports a bargaining order. Jimmy-Richards, Co., 210 NLRB 801, fn. 19 (1974) Dudek testified that he ensured that he communicated Stephen's threats to at least three-quarters of the bargaining unit. (Tr. 93) Dudek's testimony was corroborated by four current employees. Stephen, Respondent's high ranking official, directed Dudek to make these threats and when conveying the threats, Dudek specifically attributed them to Stephen. *Gissel* bargaining orders are warranted even in circumstances where hallmark violations are committed by first-line supervisors. The Board noted that "the words and actions of immediate supervisors may in some circumstances leave the strongest impression." Garvey Marine, 328 NLRB 991, 993 (1999).

The instant case is strikingly similar to C&T Manufacturing Co., 233 NLRB 1430 (1977), where the Board found a remedial bargaining order was warranted where a first line supervisor in a unit of 50 employees told the employees that the owner would shut the place down rather than have a union in the plant. As noted above, unlawful threats, accompanied by the use company officials' names are considered to be as coercive as if the threats came from the company official themselves. *Id.* at 1430.

The severity and lasting coercive effect of Respondent's hallmark violations is magnified by the fact that the bargaining unit has only eight employees. The probable impact of the unfair labor practices is heightened in such a relatively small unit and increases the need for a bargaining order. Stevens Creek Chrysler Dodge, *supra.* at 9; Michael's Painting, 337 NLRB 860 (2002); National Steel Company, 344 NLRB 973 (1995).

The impact of Respondent's unlawful conduct is manifested in the election results. At the time of the petition filing, the Union had the support of seven employees. After multiple threats of plant closure and job loss and unlawful promises to employees to pay for their votes which occurred during the critical period, the Union lost the election. These hallmark violations are exacerbated by the fact that the margin of the Union's loss was one vote.

While the record reflects that Dudek resigned from his employment in August 2014, his resignation has no bearing on the need for a remedial bargaining order. (Tr. 77) It is well-settled that the propriety of a bargaining order depends on the circumstances existing at the time the unfair labor practices were committed and is not affected by subsequent events. Skyline Distributors, 319 NLRB 270 (1995). Even assuming that Dudek's resignation is probative, a bargaining order is warranted because while Dudek was the mouthpiece, the messages came from Stephen. Stephen, who authorized and directed Dudek to make the threats, continues to work at Respondent's facility. Those threats, together with Stephen's continued presence, have a lasting impact which is unaffected by Dudek's resignation.

The possibility of erasing the effects of the Respondent's unfair labor practices and ensuring a fair election by the use of traditional remedies is slight. Requiring the Respondent to refrain from unlawful conduct in the future and to post a notice, although remedially necessary, is insufficient to dispel the coercive atmosphere that Respondent created and continues to maintain. The Board stated that, "the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights 'to bargain collectively' and 'to refrain from' such activity." Mercedes Benz of Orland Park, 333 NLRB 1017, 1019 (2001).

Counsel for the General Counsel submits that based upon the overwhelming record evidence, a bargaining order is appropriate to remedy the unfair labor practices that Respondent committed.

V. CONCLUSION

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to find that Respondent violated Section 8(a)(1) of the Act by threatening employees with job loss and plant closure if they selected the Union as its collective-bargaining representative, offering bribes to employees for their votes, by interrogating an employee on election day about his union sympathies, by coercively telling employees that they would not receive scheduled pay raises because of the Union, and by issuing wage increases to employees while Union's post-election objections were pending in order to dissuade employees' union activities. The General Counsel urges the Board to find that with regard to those violations that occurred during the critical period, the Respondent engaged in objectionable conduct sufficient to warrant that the election be set aside. The General Counsel further urges the Board to issue a *Gissel* bargaining order as a measure necessary to remedy Respondent's egregious unfair labor practices.

Dated at Cleveland, Ohio this 12th day of February 2015.

/s/ Rudra Choudhury
Rudra Choudhury
Counsel for the General Counsel
National Labor Relations Board
Region 8

rudra.choudhury@nlrb.gov

PROOF OF SERVICE

A copy of Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge (JD-03-15) was sent on February 12, 2015, to the following individual by electronic mail and where electronic mail is unknown, by regular mail:

MITCHELL STEPHEN
ACE HEATING & AIR CONDITIONING CO., INC.
1500 BROOKPARK ROAD
CLEVELAND, OH 44109

ELIJAH D. BACCUS, ESQ.
MARILYN WIDMAN, ESQ
WIDMAN & FRANKLIN, LLC
405 MADISON AVE, SUITE 1550
TOLEDO, OH 43604
Eli@wflawfirm.com
Marilyn@wflawfim.com

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33
ATTN: DAVID COLEMAN, ORG
12515 CORPORATE DRIVE
PARMA, OH 44130

dcoleman@smwlu33.org

SETH P. BRISKIN, ESQ.
MEYERS, ROMAN, FRIEDBERG & LEWIS
28601 CHAGRIN BLVD STE 500
CLEVELAND, OH 44122-4556
sbriskin@meyersroman.com

/s/ Rudra Choudhury
Rudra Choudhury
Counsel for the General Counsel
National Labor Relations Board
Region 8

rudra.choudhury@nlrb.gov